VFL Technology Corporation *and* Truckdrivers, Chauffeurs and Helpers, Local Union No. 100, affiliated with the International Brotherhood of Teamsters, AFL–CIO, Petitioner *and* International Union of Operating Engineers, Local 18, AFL–CIO, Petitioner *and* Laborers International Union of North America, Laborers Local Union No. 265, AFL–CIO, Petitioner. Cases 9–RC–16740, 9–RC–16743, and 9–RC–16745

December 15, 2000

ORDER DENYING REVIEW

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, AND HURTGEN

On December 7, 1999, the Regional Director for Region 9 issued a Supplemental Decision and Order (relevant portions are attached as an appendix) finding that the United Steelworkers of America (USWA) had effectively disclaimed interest in representing the Employer's employees and, therefore, that its contract with the Employer did not operate to bar the petitions. In accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's supplemental decision. Having carefully considered the entire matter in light of the uncontested facts, we deny the request for review.

The facts are more fully set forth in the Regional Director's decision. Briefly, the Employer loads and transports fly ash from the Zimmer generating plant in Moscow, Ohio, to landfill cells. The Employer and the incumbent USWA signed a prehire collective-bargaining agreement on February 3, 1994, effective from March 3, 1994, through March 6, 1997. Subsequently, on March 11, 1994, the Employer signed a recognition agreement with the USWA based on a contemporaneous card check, which showed that a majority of the employees in the unit had designated the USWA as their bargaining representative. Thereafter, in May 1996, the Petitioners filed petitions seeking to represent separate units of craft employees employed by the Employer at the Zimmer jobsite. An election was held on July 31, 1996, and the ballots were impounded.[1]

Subsequently, in *VFL Technology Corp.,* 329 NLRB 458 (1999), the Board found that the contract between the Employer and the USWA was a 9(a) contract, which would bar the petitions unless the incumbent USWA's disclaimer of interest in representing the Employer's employees was effective. The Board concluded, however, that the evidence was conflicting regarding whether the USWA's disclaimer was effective and, therefore, remanded the case for further evidence and a supplemental decision with respect to the disclaimer. After further hearing, the Regional Director, as noted, found that the USWA's disclaimer of interest was effective and, therefore, that its contract with the Employer did not bar the petitions. We agree.

It is well settled that a contract does not bar an election when the contracting union has validly disclaimed interest in representing the employees covered by the agreement. To be effective a disclaimer must be clear and unequivocal and made in good faith. *American Sunroof,* 243 NLRB 1128 (1979).

The facts concerning the USWA's disclaimer establish that it should be given effect. In September 1994, the Petitioners instituted a jurisdictional complaint against the incumbent USWA pursuant to article XX of the AFL–CIO's constitution. An impartial umpire found that the USWA was in violation of the AFL–CIO's constitution, and further found that the Petitioners should be given an opportunity to establish themselves as the representative of the Employer's employees. Although the USWA thereafter advised the Employer that it could make no claim on the Employer's work, the USWA continued to represent the Employer's employees and continued to assert itself as their bargaining agent. As a result of a noncompliance complaint filed by the Teamsters, the AFL–CIO thereupon instructed the USWA to comply with the umpire's decision. Consequently, on April 3, 1996, the USWA again advised the Employer that it renounced any intention to act as the employees' bargaining representative; that it would cease and desist from acting in any way as the employees' bargaining representative; and that it would not seek to be the employees' bargaining representative.

We find that the USWA's disclaimer of interest was clear and unequivocal, and expressly stated not only the USWA's intention to cease and desist from currently representing the Employer's employees, but also renounced any future representational interest. Although the Employer argued that the USWA had acted in a manner inconsistent with its disclaimer, thereby rendering the disclaimer ineffective, we agree with the Regional Director for the reasons he stated that the few arguably inconsistent postdisclaimer actions do not negate the effectiveness of the USWA's clear and unequivocal disclaimer of interest.

Our dissenting colleague argues that because the USWA disclaimed only after the Petitioners prevailed in the "no-raid" procedures under article XX of the AFL–

[1] On July 3, 1996, the Acting Regional Director issued a decision finding that the contract between the USWA and the Employer did not bar the petitions. The Employer filed a timely request for review of the Acting Regional Director's decision.

CIO's constitution, the disclaimer cannot be effective as the Board will not allow a union's no-raiding agreement to be used to supercede a binding collective-bargaining agreement, relying on *Mack Trucks, Inc.,* 209 NLRB 1003 (1974).[2] According to our dissenting colleague, as there is no evidence that the incumbent USWA is either defunct or unable to administer the extant contract, to give effect to the USWA's disclaimer would permit a vital labor organization to disavow its lawful contractual obligations. We cannot agree that *Mack Trucks* should be read so broadly.

In *American Sunroof*, 243 NLRB at 1129, the Board explained that "the essential fact in *Mack Trucks* was that the disclaimer by the contracting union resulted from a collusive agreement between the contracting union and the union which was seeking the election." Furthermore, in *NLRB v. Circle A & W Products Co.,* 647 F.2d 924 (9th Cir. 1981), the court approved *American Sunroof's* interpretation of *Mack Trucks*. The court agreed that absent collusion between the parties—i.e., two or more unions, or a union and employees—to avoid the terms of a collective-bargaining agreement, a union's disclaimer in representing the unit will be effective. 647 F.2d at 924 fn. 1 926.

Here, the evidence does not establish that the disclaimer arose from a collusive agreement between the USWA and the Petitioners, or from any other improper motive. There is no indication or claim that the disclaimer was a tactical maneuver, a sham, or made in bad faith. Significantly, there is no evidence or contention that the USWA disclaimed interest in an attempt to avoid, or have the employees avoid, the terms and obligations of the collective-bargaining agreement. The disclaimer here stemmed from the independent article XX "no-raid" procedures, a process long recognized and accorded deference by the Board. Cf. Casehandling Manual (Part Two), Representation Proceedings, Section 11017 et. seq.[3] Those procedures are clearly adversarial in nature as between the unions claiming the right under the AFL–CIO constitution to represent the unit employees. Thus, in no way can utilization of the procedures be considered collusion.

We therefore find, in accord with the Regional Director, that the USWA's disclaimer is valid. Because the USWA has validly disclaimed interest in the employees covered by the agreement, the contract between the Employer and the USWA does not operate to bar the petitions. In giving effect to the USWA's disclaimer, we are giving full expression to the Board's dual purposes of fostering labor relations stability and employee freedom of choice.[4]

Accordingly, the Employer's request for review of the Regional Director's supplemental decision finding the disclaimer to be effective is denied.

MEMBER HURTGEN, dissenting.

I disagree with my colleagues' finding that the disclaimer by the incumbent Union was effective. The Board's contract-bar rule is designed to preserve stability in collective-bargaining relationships. Indeed, the Board refuses to "permit an incumbent and vital labor organization to disavow its lawful contractual obligations."[1] In the instant case, the incumbent Union has done precisely that, apparently out of deference to a rival union which wants to represent these employees. The rival union prevailed in the "no-raid" procedures under article XX of the AFL–CIO constitution. The Board has indicated that it will not allow a union's "no raiding" agreement "to be used to supercede a binding collective-bargaining agreement interposed as a bar to an immediate election."[2]

The incumbent Union's disclaimer effectively takes away the Employer's contract rights as well as the stability afforded by the contract-bar doctrine. Moreover,

[2] Our dissenting colleague says that he would not permit a '"union-union' agreement to trump the stability of a collective-bargaining agreement." However, there is no evidence here of any "union-union" agreement. The AFL–CIO's art. XX dispute resolution machinery long predates the events of this case. Dispositions in cases brought under those procedures are reached through an adversarial process, and there is no indication that the art. XX proceedings here deviated from normal practice; nor is there any evidence of any "agreement" among the unions as to the outcome of the art. XX proceeding.

[3] See also *Food & Commercial Workers Local 158 (Queen Fisheries),* 208 NLRB 58 (1974). In that case, the union failed to execute a contract with one employer and refused to bargain with another. The union stated it was barred from these actions "by reason of Article XX." Prior to an unfair labor practice proceeding, the international union advised the Board that the local no longer wished to represent the involved employees. The Board concluded that the union "validly disclaimed representation of the units . . . . There is no evidence to indicate that the disclaimer was a mere tactical maneuver to avoid the effects of the collective-bargaining agreement . . ., or to avoid bargaining, . . . or otherwise not made in good faith." Id., at 59. The Board agreed that "it appears that the disclaimer was intended as a formal announcement that [the union], in compliance with the 'no-raid' provisions of the AFL–CIO constitution, was no longer interested in or willing to represent the employees involved here, and was renouncing its claim to act as their representative. In these circumstances, we find [the union's] disclaimer was effective as of the date made." Id.

[4] It is well settled that the Board cannot compel a union to represent employees that it no longer desires to represent. See, e.g., *Electrical Workers Local 58,* 234 NLRB 633, 634 (1978).

[1] *East Mfg. Corp.,* 242 NLRB 5, 6 (1979).

[2] *Mack Trucks, Inc.,* 209 NLRB 1003, 1004 (1974). In *Mack*, the Board refused to honor a disclaimer by an incumbent union. The Board stated that, although it had a policy of seeking in a representation proceeding to accommodate efforts to resolve disputed between unions under "no-raiding" agreements, it would not permit such agreements to be used to supercede a binding contract interposed as a bar to an election .

there is no evidence that the incumbent Union is either defunct or unable to administer the extant contract. Accordingly, I would decline to give effect to the disclaimer, and I would find the incumbent Union's contract with the Employer bars the petitions.

My colleagues say that *Mack Trucks*, supra, is distinguishable because it involved a "collusive agreement" between the incumbent and the petitioner whereby the incumbent would disclaim representation and let the petitioner seek representation. However, that phrase was not used in that case. Further, irrespective of phraseology, that case and the instant one involve an agreement between an incumbent union and a petitioner whereby the incumbent would disclaim representation and let the petitioner seek representation.

In *American Sunroof,* 243 NLRB 1128 (1979), the Board sought to distinguish *Mack Trucks*. The *American Sunroof* decision said that there was a "collusive agreement" in *Mack Trucks*. In fact, there was no agreement at all in *American Sunroof*. The incumbent, on its own, disclaimed representation because of a UD petition. Indeed, there was no contact at all, prior to the disclaimer, between the incumbent and the petitioner.[3]

Based on the above, the following principles emerge. If the incumbent and a petitioner agree to have the incumbent disclaim representation and to have the petitioner seek representation, the Board will not permit this "union-union" agreement to trump the contract-bar stability of a collective-bargaining agreement. On the other hand, if the incumbent union, on its own, disclaims representation, the Board will permit a subsequent RC petition by another union.

The instant case involves the former situation. The incumbent Union did not simply decide, on its own, to disclaim representation. Rather, the incumbent and the petitioner were mutually bound to the article XX dispute resolution machinery, and were mutually bound to honor the decision that emerged therefrom. That is precisely what the incumbent Union did here, and that is a far cry from the unilateral action in *American Sunroof*. Thus, I would not permit the "union-union" agreement to overcome the contract bar.[4]

[3] Similarly, in *NLRB v. Circle A & W Products Co.,* 647 F.2d 924 (9th Cir. 1981), the incumbent union disclaimed because of a UD petition.

[4] As my colleagues note, a union's disclaimer of representation will preclude a bargaining order remedy in an unfair labor practice case. See *Food & Commercial Workers Local 158 (Queen Fisheries),* 208 NLRB 58 (1974). That is, the Board will not force representation on an unwilling union. However, the instant case is a representation case, and the issue is whether the Employer-Union contract will be a contract bar to another union's petition.

APPENDIX

SUPPLEMENTAL DECISION AND ORDER

Pursuant to petitions filed on various dates in May 1996 by Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, AFL–CIO (Teamsters 100) (Case 9–RC–16740); International Union of Operating Engineers, Local 18, AFL–CIO (Operating Engineers Local 18) (Case 9–RC–16743); and Laborers International Union of North America, Laborers Local No. 265, AFL–CIO (Laborers Local 265) (Case 9–RC–16745), seeking to represent separate units of craft employees employed by the VFL Technology Corporation (the Employer) at its Zimmer jobsite, Moscow, Ohio, an initial representation hearing before a designated hearing officer of the Board closed on June 6, 1996.

The Employer, contrary to the Petitioners, maintained that a contract between the Employer and United Steelworkers of America (the Steelworkers) was a bar to the processing of the petitions. The contract between the Employer and the Steelworkers covered all construction employees and truckdrivers employed by the Employer at its Zimmer jobsite and was effective by its terms from February 5, 1994, through March 6, 1997. The Petitioners took the position that the contract between the Employer and the Steelworkers was not a bar since it was entered into at a time when the Steelworkers did not represent a majority of the Employer's employees and, in any event, the Steelworkers had on two occasions effectively disclaimed interest in representing any of the unit employees. The record discloses that at the time the contract was executed on February 3, 1994, the Employer had not commenced work at the Zimmer jobsite and had not hired any employees. On February 21, 1994, the Employer hired its work force and has actively been engaged in on-site work since that date.

On March 11, 1994, after the prehire contract was executed and after employing its work force, the Employer and the Steelworkers signed a recognition agreement based on a card check which disclosed that a majority of the Employer's construction employees and truckdrivers had designated the Steelworkers as their bargaining representative. The recognition agreement specifically provided that the Employer recognized the Steelworkers as the representative of its employees and that the parties would meet for the purposes of negotiating a mutually acceptable collective-bargaining agreement. However, the Employer and the Steelworkers did not meet for bargaining and never executed a new collective-bargaining agreement. The Employer merely continued to apply the terms of the previous prehire agreement.

The Acting Regional Director found that regardless of whether the Employer was engaged in the construction industry, the contract with the Steelworkers was not a bar to the petitions. In the opinion of the Acting Regional Director, if the Employer were not in the construction industry, the prehire agreement with the Steelworkers would not, under *General Extrusion,* 121 NLRB 1165 (1958), bar the petitions. If the Employer were in the construction industry, the Steelworkers majority showing and the Employer's card check and recognition created a 9(a) relationship. However, because the Em-

ployer and the Steelworkers did not subsequently execute a contract or refer to the prehire contract in their recognition agreement, there was no bar to processing the petitions. Although noting that the first disclaimer filed by the Steelworkers was clearly ineffective, the Acting Regional Director found, under the circumstances, that it was unnecessary to rule on the effectiveness of the Steelworkers' second disclaimer. Accordingly, the Acting Regional Director directed separate elections in the three-craft groups. While the Employer's request for review was pending before the Board, the elections were held on July 31, 1996, and the ballots in all three elections were impounded.

The Board disagreed with the Acting Regional Director's finding that the agreement between the Employer and the Steelworkers was not a bar to the petitions. The Board held that regardless of the nature of the contract between the Employer and the Steelworkers at its inception, following the establishment of the 9(a) relationship, the contract between the parties was from that point forward a 9(a) agreement. Accordingly, the Board found that the contract was a bar to the petitions unless the Steelworkers effectively disclaimed interest in representing the unit. The Board, therefore, remanded the case to me to reopen the hearing, receive additional evidence, and issue a supplemental decision solely with respect to whether the Steelworkers effectively disclaimed interest in representing the unit and, thereafter, take any further appropriate action necessary to resolve the petitions.

Pursuant to the Board's Order, on November 9, 1999, I reopened the record and scheduled an additional hearing on the issue of whether the Steelworkers effectively disclaimed interest in representing the unit. On November 19, 1999, a further hearing was held before a hearing officer of the Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[1]

The record discloses that after the Employer recognized and entered into the contract with the Steelworkers, the Petitioners filed a complaint with the AFL–CIO, alleging that the Steelworkers violated sections 2 and 3 of article XX of the AFL–CIO constitution. The dispute was submitted to an impartial umpire, Howard Lesnick, on a stipulation of facts for a determination as to whether the Steelworkers had violated the AFL–CIO constitution. On September 27, 1994, the umpire issued his decision finding that the Steelworkers had violated sections 2 and 3 of article XX of the AFL–CIO constitution. No appeal was filed to the umpire's decision.

On November 15, 1994, the assistant to the president of the Steelworkers, Bernard Hostein, wrote to the president of the Employer, Richard W. Patton, and advised that the Steelworkers could no longer claim the work at the Zimmer facility in Moscow, Ohio, and released the Employer from the obligations under the collective-bargaining agreement. The Employer declined to accept the "disclaimer" and the Steelworkers did not cease representing the employees. It appears clear that this disclaimer was not effective based on the Steelworkers' subsequent conduct.

On May 4, 1995, the general president at that time of the AFL–CIO, Ronald Carey, advised the then-president of the Steelworkers, Lynn Williams, in writing, that Teamsters Local 100 had requested that he seek enforcement of the above-described umpire's decision. On March 7, 1996, the secretary-treasurer of the AFL–CIO, Richard Trumpka, convened a subcommittee of the executive council to consider the complaint filed by the Teamsters alleging noncompliance by the Steelworkers with the umpire's decision. The subcommittee determined that the Steelworkers were in noncompliance with the umpire's decision. Thereafter, on March 18, 1996, the president of the AFL–CIO at that time, John J. Sweeney, advised the then-president of the Steelworkers, George Becker, in writing, of the committee's finding and specifically directed the Steelworkers to:

> 1. . . . [i]mplement the agreement made at the noncompliance subcommittee to try and work with the Employer and IBT to gain the Employer's cooperation in recognizing IBT, Local 100 as the collective-bargaining representative of all truck drivers presently employed by VFL Technology Corporation doing fly ash removal work at the Wm. H. Zimmer generating station in Moscow, Ohio.
>
> 2. If the Employer refuses to recognize the IBT as the representative of those employees within 30 days from the date of the March 7, 1996 subcommittee meeting, the USWA must:
>
> (a) Promptly renounce any intent to act as the exclusive collective-bargaining representative of those employees.
>
> (b) Cease and desist from acting in any way as the bargaining representative of those employees; and
>
> (c) Advise both the Employer and those employed, in writing, by April 8, 1996 that the USWA is not now, and does not seek to be, the employees' bargaining representative.

Sweeney also advised the Steelworkers that although the subcommittee's decision technically applied only to the Teamsters, if any other union involved in the article XX case filed a noncompliance complaint, the subcommittee would make the same finding.

The Steelworkers were apparently unsuccessful in obtaining the Employer's agreement to recognize any of the Petitioners. Therefore, on April 3, 1996, Hostein advised Patton, in writing, that the AFL–CIO subcommittee's directives were unequivocal and that the Steelworkers effective immediately:

> (a) Renounces any intent to act as the exclusive collective-bargaining representative of the employees of VFL performing fly ash removal work at the Wm. H. Zimmer generating station;
>
> (b) Cease and desist from acting in any way as the bargaining representative of those employees; and

[1] At the remand hearing, Operating Engineers Local 18 and Laborers Local 265, without objection, moved to withdraw their petitions based on the passage of time from their filings. Accordingly, the motions to withdraw their petitions filed by Operating Engineers Local 18 (Case 9–RC–16743) and Laborers Local 265 (Case 9–RC–16745) are granted and those cases are closed.

(c) Does not and will not seek to be the bargaining representative of those employees.

The record discloses that Hostein also advised the local union officials and all of the unit employees, in writing, that the Steelworkers had disclaimed interest in representing the employees and that the Steelworkers was no longer their collective-bargaining representative.

On April 4, 1996, in writing, the Employer's president advised the Steelworkers that it "declined the Steelworkers' offer" to disclaim representing the employees and insisted that the Steelworkers fulfill its obligations under the collective-bargaining contract. Thereafter, the Employer, on two occasions, requested the Steelworkers to extend the collective-bargaining contract. The Steelworkers declined to extend the agreement and again advised the Employer that they had disclaimed any interest in representing the employees. However, the record discloses that the Employer continued to apply the contractual wages and other terms and conditions of employment to the employees.

On September 12, 1996, the Steelworkers requested a response from the Employer regarding two grievances which had been filed under the contract. However, the record discloses that these two grievances were both filed prior to the time the Steelworkers disclaimed interest in representing the unit. The Employer took the position that the grievances were untimely and they were subsequently dropped by the Steelworkers. In addition, it appears that an employee attempted to file a grievance with the Steelworkers after the disclaimer. Although this grievance was apparently presented to the Employer, the record discloses that it was never processed by the Steelworkers and local union officials were informed that they were not to process grievances.

It appears from the record that the Steelworkers on one occasion requested that dues money be submitted after the disclaimer. However, the dues were apparently for the 2 months immediately preceding the disclaimer. The Employer also submitted dues moneys as well as dues-checkoff cards from employees for a number of months after the disclaimer. The dues-authorization cards were received by the financial department of the International Union and were retained. The record discloses that the International normally would return such dues-authorization cards to the local for its records. However, the dues-authorization cards in question were retained by the International because the Steelworkers no longer represented the employees. Moreover, the Steelworkers subsequently returned to the Employer all dues which had been deducted and submitted to the Steelworkers after its disclaimer.

The record reflects that sometime after the disclaimer, the Employer requested that the Steelworkers provide it with the names of some potential employees. Pursuant to this request, the Steelworkers sent the Employer a list containing the names of several out-of-work members. It appears that the Employer employed at least some of these individuals. However, the record discloses that the Steelworkers have, on occasion, referred out-of-work members to other employers with whom it does not have a collective-bargaining contract. There is no evidence that the Steelworkers made any effort to require that the Employer utilize any of its referral systems or that the Steelworkers attempted to represent any of the referred employees.

A careful review of the Steelworkers' conduct as detailed in the record convinces me that its second disclaimer of April 3, 1996, was effective and that its contract with the Employer was not a bar to the petitions.[2] The Board has consistently held that a contract does not bar an election when the contracting union has properly disclaimed interest in the employees covered by the agreement. *Plough, Inc.,* 203 NLRB 121 (1973); *American Sunroof*, 243 NLRB 1128 (1979). However, a disclaimer will not remove the existing contract as a bar if the labor organization acts inconsistent with its disclaimer. *East Mfg. Corp.,* 242 NLRB 5 (1979).

The record here discloses that the Steelworkers about April 3, 1996, unequivocally disclaimed interest in representing the employees. The disclaimer was made known to the Employer, local union officials and all employees. Moreover, the record discloses that the Steelworkers did not engage in any subsequent conduct sufficient to render its disclaimer ineffective. Although local union officials may not have been pleased with the disclaimer, they did not engage in sufficient conduct to nullify the disclaimer. Moreover, the Employer clearly did not agree with the Steelworkers' disclaimer. However, it is the action of the Steelworkers, not the Employer, that determines the effectiveness of the disclaimer. The fact that the Employer continued to apply the terms of the agreement to the employees does not negate the disclaimer. Indeed, the Steelworkers' refusal to agree with the Employer's proposal to extend the prior contract is strong evidence that Steelworkers was giving effect to the disclaimer.

Contrary to the Employer's position in its brief, the fact that dues were deducted by the Employer and submitted to the Steelworkers after the disclaimer does not render it ineffective. *American Sunroof*, supra. Indeed, the Steelworkers subsequently returned to the Employer the dues submitted after the disclaimer. This is similar to the situation in *American Sunroof*, where the labor organization involved placed dues that had been submitted by an employer after a disclaimer in an escrow account. The Board found that the union's conduct in placing the dues in escrow did not detract from its disclaimer. Moreover, the fact that health, welfare, and pension payments were submitted on behalf of employees to union funds does not adversely impact the disclaimer. The record discloses that the funds are separate entities from the Steelworkers.

Likewise, contrary to the Employer's position in its brief, the fact that a local steward may have presented or even pursued a grievance on behalf of an employee after the April 3, 1996 disclaimer is not inconsistent with the disclaimer. *Miratti's, Inc.,* 132 NLRB 699 (1961); Cf. *Franz Food Products of Green Forest, Inc.,* 137 NLRB 340 (1962). The record discloses that

[2] The Employer argues that the effectiveness of the Steelworkers' disclaimer must be determined based on the Steelworkers' conduct at the time the petitions were filed rather than by its subsequent action. I agree that the relevant issue is whether a contract bar existed at the time the petitions were filed. However, the Steelworkers' subsequent conduct, consistent with its disclaimer, is relevant in determining whether the disclaimer was effective.

the steward was advised by officials of the Steelworkers that grievances were not to be processed. Indeed, the grievance in question was never processed by the Steelworkers.

I do not agree with the Employer's position that there is conflicting evidence as to whether local officials were instructed to continue to represent the unit. Although the local steward, at the initial hearing, indicated that the local president informed him to continue his duties as in the past, it is clear that the steward was informed by the International that the Steelworkers had disclaimed interest in the unit. Finally, the fact that the Steelworkers, in response to a request from the Employer, furnished the names of some out-of-work members for possible employment is not inconsistent with the disclaimer. The evidence discloses that the Steelworkers has made referrals to other employers with whom it does not have a collective-bargaining relationship.

I agree with the Employer's position expressed in its brief that the Board and courts have held that a disclaimer will not be given effect, if under the surrounding circumstances, such disclaimer is inconsistent with a union's conduct. *Dycus v. NLRB,* 615 F.2d 823 (9th Cir. 1980); *Electrical Workers (Texlite, Inc.),* 119 NLRB 1792 (1958). However, the cases cited by the Employer in its brief in support of its position are clearly distinguishable from our circumstances. For example, *Hershey Chocolate Corp.,* 121 NLRB 901 (1958); and *Polar Ware Co.,* 139 NLRB 1006 (1962), do not specifically involve the effectiveness of a disclaimer. In *Hershey* and *Polar Ware*, supra, it was alleged that the incumbent labor organizations were defunct or that a schism existed. Here, there is no contention that the Steelworkers could not represent the unit employees because of defunctness or schism. On the other hand, in *Electrical Workers Local 58,* 234 NLRB 633 (1978), and *Hartz Mountain Corp.*, 260 NLRB 323 (1982), cited by the Employer for the general proposition that for disclaimers to be effective, they must not be accompanied by inconsistent action, are remarkably similar to the instant case. In both *Local 58* and *Hartz Mountain*, the Board found that the disclaiming unions, like the Steelworkers here, had not engaged in sufficient inconsistent action to nullify their disclaimers. In *3 Beall Bros 3,* 110 NLRB 685 (1954), the Board found that the disclaiming union had engaged in action inconsistent with its disclaimer by picketing in an effort to continue its status as bargaining representative of the unit employees. In *Texlite, Inc.,* supra, the disclaiming union, subsequent to its disclaimer, restrained members from striking and stated it would be willing to sign a new contract covering the employees. Here, the Steelworkers did not engage in any affirmative action after its disclaimer in an effort to continue its status as the bargaining representative of the unit employees. Finally, in *East Mfg. Corp.,* supra, relied on by the Employer, the incumbent local labor organization, consisting only of employees of the employer therein, filed a disclaimer because some unit employees expressed dissatisfaction with its representation. The Board found that the mere dissatisfaction of certain members with the adequacy of the union's representation did not provide grounds to disclaim and that the incumbent union was able and willing to continue to represent the employees. Here, by contrast, the Steelworkers disclaimed because it no longer desired or was willing to represent the unit employees. Moreover, the fact that it was instructed to disclaim by its parent organization does not render the disclaimer a nullity.

Based on the foregoing, the entire record and after careful consideration of the arguments of the parties at the hearings and in their briefs, I find that the Steelworkers effectively disclaimed interest in representing the unit employees and that its contract with the Employer is not a bar to the petitions. Accordingly, I shall order that the ballots cast and impounded in the unit sought by Teamsters Local 100 (Case 9–RC–16740) be opened and counted to determine whether the employees in such unit wish to be represented by that labor organization for the purposes of collective bargaining. Inasmuch as I have approved the motions by Operating Engineers Local 18 and Laborers Local 265 to withdraw their petitions, the ballots cast by employees in the Operating Engineers Local 18 unit (Case 9–RC–16743) and Laborers Local 265 unit (Case 9–RC–16745) shall be neither opened nor counted.

ORDER

It is hereby ordered that the ballots cast and impounded in the Teamsters Local 100 unit (Case 9–RC–16740) shall be opened and counted at a time and place to be established by me to determine whether or not the employees in the unit desire to be represented for collective-bargaining purposes by Truck Drivers, Chauffeurs and Helpers, Local Union No. 100, affiliated with the International Brotherhood of Teamsters, AFL–CIO.